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Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 769

Case No. 833: VAN UYE

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Francis Spain;

Whereas, on 12 June 1994, Rolf van Uye, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) (hereinafter referred to as "the Agency"), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 January 1995;

Whereas, on 12 January 1995, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, inter alia:

"... to order or take the following measures or decisions:

A. To order the production by the UNRWA Administration of Annex F to the report of the International Staff Joint Appeals Board, report dated 25 February 1994, and of any

documentation or evidence related to the allegations which caused the decision of non-extension of appointment;

B. To order the rescission of the administrative decision, dated 12 February 1993, not to extend the Applicant's appointment beyond 29 May 1993; ...

C. To adjudge and declare that he was illegally denied his right to a five year extension, ...

D. To declare that the Applicant was not given the true reasons for the denial of further employment ...

E. To declare that the Applicant was illegally denied his right to be informed of any allegation made against him which caused the decision not to extend his appointment, and his right to respond to such allegations;

F. To order his reinstatement in UNRWA with a five year appointment;

G. Should the Secretary-General decide, in the interest of the U.N., that the Applicant should be compensated and not reinstated, to order payment to the Applicant of a compensation equivalent to five years net base salary at P4 grade for assignment to Gaza;

H. To order payment of US $250,000 as compensation for the material and professional injury sustained and its moral and financial consequences on the Applicant's professional career and expectations;

I. To order reimbursement of all legal costs incurred in relation to the present complaint."

Whereas, the Respondent filed his answer on 27 October 1995;

Whereas, the Applicant filed written observations on 25 January 1996, on which the Respondent submitted comments on 15 March 1996;

Whereas, on 23 February 1996, the Applicant submitted a request for an additional document and on 22 April 1996, the Respondent submitted his views thereon;

On 1 November 1991, he assumed his new functions. On 14 December 1991, the Applicant requested the Secretary-General to review the decision to assign him to hardship posts.

On 4 May 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB) alleging discrimination in his various assignments to hardship duty stations. From 6 April 1992, the Applicant was placed on medical leave, and, on 13 April 1992, he was evacuated from Garissa to Nairobi, where he remained on medical leave until 2 August 1992.

In a cable dated 16 July 1992, an official of the Personnel Section at Headquarters informed the UNHCR Office in Kenya that "according to medical determination from Joint Medical Service following earlier medical report from Nairobi [the Applicant] was to be considered for other duties and away from the field, preferably in a capital with appropriate medical facilities. [The Applicant] therefore being considered for reassignment. Would in this connection also urge [the Applicant] to apply for suitable vacancies".

In a medical report dated 28 July 1992, a doctor in Kenya detailed problems that the Applicant faced with his vision, concluding, "[The Applicant] needs posting where immediate ophthalmic attention is available as pan-uveitis is a sight threatening disease". On 2 August 1992, the Applicant was authorized to travel on home leave to The Gambia.

On 18 November 1992, a UN Dispensary Physician in The Gambia transmitted to the Joint Medical Service at Headquarters a medical report from an ophthalmologist in The Gambia who had examined and treated the Applicant for eye problems. The report described the Applicant's condition as "possibly recurrent and sight threatening" and stated "it is important that [the Applicant] always has access to ophthalmic expertise and drugs." On 29 November 1992, the Regional Representative for West Africa, Dakar, forwarded to the Joint Medical Service at Headquarters a medical report on the

Applicant from an ophthalmologist in Dakar, also recommending treatment "in USA or Europe".

On 4 December 1992, the Applicant was informed that he had been selected for the position of Senior Repatriation Officer in Kinshasa, Zaire. In a reply dated 11 December 1992, the Applicant informed the Director, Division of Human Resources Management, that he would be unable to confirm his availability for the post "in view medical determination by Joint Medical Service [JMS] that posting should be considered for a capital city with appropriate medical facilities". Also "Kinshasa Zaire is classified as a 'D' duty station therefore reasonable to assume that medical facilities inappropriate and not in strict accordance with JMS determination".

In a memorandum dated 31 December 1992, to UNHCR Headquarters, the Resident Representative, The Gambia, transmitted a recommendation for medical evacuation of the Applicant and requested authorization for the necessary travel arrangements. On 7 January 1993, medical evacuation of the Applicant to Dakar, Senegal, was authorized.

On 13 January 1993, a Personnel Officer asked the Joint Medical Service to advise whether Kinshasa had the necessary medical facilities to enable the assignment of the Applicant to that duty station. In a reply dated 1 March 1993, the Director of the Medical Service stated that the Applicant could serve in Kinshasa, provided that he was able to travel once a month to Brazzaville for medical treatment.

On 5 April 1993, the Applicant was informed that he had been appointed as Deputy Regional Representative, Kinshasa, with effect from 1 May 1993. On 11 April 1993, the Applicant informed UNHCR Headquarters "regret my inability to assume appointment as Deputy Regional Representative, Kinshasa, Zaire, in view of same health circumstances".

On 28 April 1993, the Applicant was advised by the Personnel Office that the Joint Medical Service had determined "there is no reason to preclude you from taking up this assignment, adding however that, should there be no ophthalmological treatment available in Kinshasa, you should be permitted to travel to Congo, Brazzaville, each month for appropriate treatment". The Applicant was further advised "you [are] expected to travel immediately to Zaire reporting no later than 21 May 1993. Failure to do so, without prior approval from Headquarters, will be considered as abandonment of post, which will lead to separation from service".

An exchange of correspondence ensued between the Applicant and the Administration concerning his refusal to assume his new functions and his medical condition.

On 2 June 1993, the Applicant was again instructed by Headquarters to report for duty, by 16 June, and advised that "your absence from duty will be considered as abandonment of post". He was further advised, "should you fail to report to duty, despite warnings given, your intent to separate from the organization will be presumed". In a reply dated 5 June 1993, the Applicant stated:

> "My failure to assume duty at Zaire can never amount to an abandonment of post as per 105.1 of the staff rules because I have very strong and cogent reasons and explanations for not doing so ... I have no intention to separate myself from the Organisation. All I want is an assignment that would not work injury to my health."

On 21 August 1993, the Applicant wrote to the Secretary-General, referring to his letter of 14 December 1991 and noting, "the proceeding of my appeal has lasted over one and a half years without conclusion ..." He requested permission to submit his appeal directly to the Administrative Tribunal.

In a cable dated 30 September 1993, the Applicant was advised that "... your continued absence from the duty station to which the High Commissioner has assigned you is considered as unauthorised and

under the provisions of Staff Rule 105.1(6)(ii) the payment of salaries and allowances will cease with immediate effect". The Applicant was further advised that if he did not assume his duties as Deputy Representative in Zaire by 6 October 1993, "you will be regarded as having abandoned your post and will be separated from service on that date with no further notice".

In a reply dated 6 October 1993, the Applicant, noting that he had never been examined by the JMS, reiterated that "I cannot assume duties in any hardship duty station contrary to the recommendation of the UN doctor here". In reply, the Personnel Department advised the Applicant that as he did "not yield any new information or provide any adequate or acceptable evidence as to why you were unable to report for duty as Deputy Representative in Zaire on 6 October 1993 ... you are being separated from the service of the Organization for abandonment of post with effect from 6 October 1993".

On 26 December 1993, the Applicant wrote to the JAB, amending his appeal to include the decision of the High Commissioner to treat his actions as abandonment of post. On 24 January 1994, the Principal Officer, Office of the Under-Secretary-General for Administration and Management informed the Applicant that "the Secretary-General would like to have the benefit of the factual findings and recommendations of the Joint Appeals Board ...".

On 25 October 1994, the Applicant again wrote to the Secretary-General, noting the continuing delay in the JAB's consideration of his appeal and requesting permission to submit the appeal directly to the Tribunal. On 15 November 1994, the Under-Secretary-General for Administration and Management granted the Applicant's request.

On 21 January 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. All the Applicant's assignments were in hardship postings. The Applicant was not fairly considered for more favourable duty stations and the proper procedure for assignment and rotation of staff was not followed.

2. The Applicant did not abandon his post and termination of his appointment on that ground is wrongful. The Applicant's refusal to proceed to Kinshasa was related to his medical condition, which made it impossible for him to serve there.

3. The Joint Medical Service was wrong to make a finding contrary to that of the UN resident doctor who examined the Applicant.

Whereas the Respondent's principal contentions are:

1. Separation on the grounds of abandonment of post is caused by the actions of the staff member. The Applicant was repeatedly warned that failure to report for duty would be treated as abandonment of post and his deliberate decision to defy written instructions to report for duty constitutes abandonment of post.

2. The Applicant's appointment is subject to the Staff Regulations and Rules which bind the Applicant. The Applicant's Letter of Appointment does not exempt him from Staff Regulation 1.2 to enable him to refuse to report for assigned duties.

The Tribunal, having deliberated from 11 July to 2 August 1996, now pronounces the following judgement:

I. The Applicant was a staff member of UNHCR from 1 April 1980 to 6 October 1993, when he was separated from service for abandonment of post. During the course of the Applicant's career, he served in several hardship duty stations. He protested, suggesting that he was being subjected to discrimination by these

consecutive hardship assignments. Finally, for medical reasons, he refused to accept an assignment, first, to the post of Senior Repatriation Officer and then, to the post of Deputy Regional Representative in Kinshasa, Zaire. This refusal led to his separation from service.

II. On 4 May 1992, prior to the assignment which led to his separation, the Applicant filed an appeal with the Joint Appeals Board (JAB), alleging discrimination in the pattern of his assignments. Following his separation, the Applicant amended his appeal to include the issue of his separation for abandonment of post. The Applicant had requested, in the light of the long delay in consideration of his JAB appeal, that the Respondent allow him to submit the appeal directly to the Tribunal. In January 1994, this request was rejected, but it was eventually granted on 15 November 1994.

III. The first issue for the Tribunal to determine is the proper scope of the Applicant's appeal. The Respondent argues that the appeal should be limited to the issue of abandonment of post. The Tribunal finds that the Respondent gave his consent, without limitation, to the Applicant to submit his appeal directly to the Tribunal. No limitation can subsequently be imposed by the Respondent.

IV. The Applicant argues that he should not have been separated for abandonment of post because he never assumed the post which he is said to have abandoned. The Tribunal accepts the Applicant's argument on this point. The Applicant explained his refusal to assume the post, based on his medical condition. The Respondent rejected this explanation. The Administration insisted that the

Applicant take up the post and warned him that he would be separated if refused. Under such circumstances, the Tribunal finds that, although the Applicant should have assumed the post and protested this decision through the established channels of administrative recourse, the Respondent acted wrongly in proceeding as he did.

V. The issue in this case is the Applicant's refusal to assume the functions of the post to which he had been assigned. The Respondent should have submitted this conduct to disciplinary proceedings. Such proceedings would have given the Applicant due process protection and an opportunity to defend his conduct by raising the medical issues in his case. By separating the Applicant for abandonment of post, the Respondent denied him this opportunity.

VI. While the Applicant does appear to have been posted to many hardship duty stations, he has not adduced evidence of discrimination. Staff Regulation 1.2 provides that "staff members are subject to the authority of the Secretary-General and to assignment by him to any of the activities or offices of the United Nations". The Tribunal finds that it was within the discretion of the Respondent to assign the Applicant to Kinshasa, Zaire. The Applicant has provided evidence of his medical condition, but he has not produced evidence that his submissions to the Medical Office were reviewed in a manner which lacked impartiality or was tainted by extraneous factors. A determination was made, following review of the medical submissions of the Applicant, that he could undertake service in Zaire. It is not for the Tribunal to substitute its judgement for that of the Medical Service in this respect, in the absence of a showing of improper motive or procedural irregularity.

VII. With regard to the issue of proper notice of termination, the Tribunal finds that, although the Applicant was given ample

notice of his impending separation, having been warned in writing on four occasions that his refusal to report to duty would result in his separation, proceedings to separate the Applicant from service in these circumstances should have been conducted under Staff Regulation 10.2. In this manner, a more appropriate review could then have been conducted of the medical issues raised by the Applicant in explanation of his refusal.

VIII. For the foregoing reasons, the Tribunal concludes that the Applicant should not have been separated from service on the grounds of abandonment of post. Accordingly, the Tribunal:

A. (1) Rescinds the decision of the Respondent dated 6 October 1993;

(2) Orders that the Applicant be reinstated to a post comparable to that to which he was assigned with full payment of salary and emoluments from the date of his separation, less his earnings from other employment in the interim.

B. Should the Secretary-General, within 30 days of the notification of this judgement decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in his case, the Tribunal fixes the compensation to be paid to the Applicant as one year of his net base salary payable at the rate in effect on the date of his separation from service. This sum includes any entitlement the Applicant may have had to a termination indemnity under the pertinent Staff Regulations and Rules.

C. As regards his claim for compensation for a job related illness, this should be submitted to the appropriate instance under Appendix D to the Staff Regulations and Rules.